Supreme Court, U.S.
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No. 03-__ 031398

IN THE

Supreme Court of the United States

Eugene Crum, Jr., et al.

Petitioners,

v.

Thomas G. Flowers, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that petitioners lacked standing to appeal the district court's denial of their motion for civil contempt sanctions for the sole reason that they were not named as parties in the underlying litigation?

2. Does Federal Rule of Civil Procedure 71 permit intended, although not individually named, beneficiaries of an injunction to seek enforcement of that injunction?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the petitioner named in the caption, the following parties appeared below and are petitioners here: Charles E. Archie, Jr.; Carolyn Ball; Carol Banks; David Barley; John Bradford; Milton Burton; Pauline Burton; Lynn Carter; Clyde Chatman; Preston Coleman; Betty Crum; Eugene Crum, Jr.; Grant Culliver; Jerome F. Dangerfields; Etheline Duster; Venus Edwards; Mable G. Elliott; Andrey D. Finch; Samuel Foster; Lewis Gilchrist; Freddy Golthy; Terry Dale Goodson; Ricky Grider; Romanza A. Hamilton; Willie Harris; Michael Hopkins; Jacquelyn J. Jackson-Kelly; Yvonne C. Jennings; Gladys Jones; Theodore Jones; Willie Kelley; Deborah F. Lumpkin; Katherine Matthews; Roosevelt Mays, Jr.; Shirley Mays; Eddie G. McCoy; Robert E. Moore; Benny Newton; Herman Powell; Samuel L. Price; Pamela Ramos; Kenneth Rodgers; David Said; Geneice Smith; Robert L. Smith; Wanda Jackson Speights; Thornton Taylor; Ellen Tolbert; Earl Vaughn; Nonie Williams; John W. Winston; Tamblyn Witherspoon; Darrell Wright; Earnest Wright; and a class of black persons who are employed, have been employed, or who may in the future be employed by the State of Alabama and its agencies, boards, commissions and officials, the Florence/Lauderdale County Emergency Management Agency, Lauderdale County, and the Lauderdale County Commission.

In addition to the respondent named in the caption, the following parties appeared below and are respondents here: Florence/Lauderdale County Emergency Management Agency; Lauderdale County; Lauderdale County Commission; State of Alabama and its agencies, boards, commissions and officials including: Alcoholic Beverage Control Board; Board of Accountancy; Bureau of Tourism

and Travel; Commission on Aging; Commission on Physical Fitness; Department of Agriculture and Industries; Department of Conversation and Natural Resources; Department of Corrections; Department of Economics and Community Affairs; Department of Education; Department of Human Resources; Department of Industrial Relations; Department of Labor; Department of Mental Health; Department of Public Health; Department of Rehabilitation Services; Department of Revenue; Department of Voter Registration; Development Office; Emergency Management Agency' Industrial Development Training Agency; Labor Board; Medicaid Agency; State Board of Registrars; State Docks; State Personnel Board; State Personnel Department.

The plaintiff in the underlying litigation, *United States* v. *Flowers*, was the United States.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW AND JURISDICTION 1
RELEVANT STATUTORY PROVISION 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT AND SUMMARILY REVERSING THE COURT OF APPEALS' JUDGMENT 5
I. Summary Reversal Is Appropriate Because The Eleventh Circuit's Holding That Nonparties Lack Standing To Appeal Directly Contravenes Supreme Court Precedent 6
II. The Scope Of Rule 71 Is An Important Issue That Has Divided The Circuits; Remand Would Force The Court Of Appeals To Address The District Court's Erroneous Interpretation And Would Aid This Court's Future Review 10
CONCLUSION 16

TABLE OF AUTHORITIES

Supreme Court Cases

Barnhart v. *Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002) 13
Blossom v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655, 17 L. Ed. 673 (1864) 6, 8
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 11
California v. *Prysock*, 453 U.S. 355 (1981) 10
Devlin v. *Scardelletti*, 536 U.S. 1 (2002) ..... passim
Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000) 11
Hinckley v. *Gilman, C., & S. R. Co.*, 94 U.S. 467, 24 L. Ed. 166 (1877) 7, 8
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 10
Marino v. *Ortiz*, 484 U.S. 301 (1988) 9, 10
Maryland v. *Dyson*, 527 U.S. 465 (1999) 10
Nat'l Mines Corp. v. *Caryl*, 497 U.S. 922 (1990) 10
Olden v. *Kentucky*, 488 U.S. 227 (1988) 10
Pavelic & LeFlore v. *Marvel Entm't Group*, 493 U.S. 120 (1989) 13
Rubin v. *United States*, 449 U.S. 424 (1981) 13
United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 9
United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) 6, 7, 8

Lower Court Cases

Aiken v. *City of Memphis*, 37 F.3d 1155 (CA6 1994) 11
Beckett v. *Air Line Pilots Ass'n*, 995 F.2d 280 (CADC 1993) 11
Berger v. *Heckler*, 771 F.2d 1556 (CA2 1985) 12
Brennan v. *Nassau County*, 352 F.3d 60 (CA2 2003) 11

Cordoza v. *Pac. States Steel Corp.*, 320 F.3d 989 (CA9 2003) 9
Floyd v. *Ortiz*, 300 F.3d 1223 (CA10 2002) 11, 12
Hook v. *Ariz. Dep't of Corrections*, 972 F.2d 1012 (CA9 1992) 11, 12
In re Bridgestone/Firestone Tire Prods. Liab. Litig., 333 F.3d 763 (CA7 2003) 9
Karaha Bodas Co. v. *PERTAMINA*, 313 F.3d 70 (CA2 2002) 9
Moore v. *Tangipahoa Parish Sch. Bd.*, 625 F.2d 33 (CA5 1980) 12
Northside Realty Assoc., Inc. v. *United States*, 605 F.2d 1348 (CA5 1979) 4, 14
Reynolds v. *Alabama Department of Transportation*, CV-85-T-665-N (M.D. Ala.) 15
Reynolds v. *Butts*, 312 F.3d 1247 (CA11 2002) 11, 14
Securities & Exchange Commission v. *Prudential Securities, Inc.*, 136 F.3d 153 (CADC 1998) 12
South v. *Rowe*, 759 F.2d 610 (CA7 1985) 11
United States v. *Frazer* [*Frazer I*], 317 F. Supp. 1079 (M.D. Ala. 1970) 1, 2
United States v. *Frazer* [*Frazer II*], No. CIV.A.2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976) 2, 3
Washington Hosp. v. *White*, 889 F.2d 1294 (CA3 1989) 11

Statutes

28 U.S.C. 1254 1
28 U.S.C. 1291 ..... 1, 6
28 U.S.C. 1292(b) 5
Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, as amended 42 U.S.C.A. 1981a, 2000e, through 2000e-17 ..... 1, 15

Treatises

JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE (3d ed. 2002). 13

Other Authorities

FED. R. CIV. P. 71 ..... passim
U.S. CONST. amend. XIV 1

PETITION FOR A WRIT OF CERTIORARI

Petitioners Eugene Crum, Jr., et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW AND JURISDICTION

The court of appeals' order dismissing petitioners' appeal (Pet. App. 1a) is unpublished. The court of appeals' order to show cause why the appeal should not be dismissed (*id.* 21a) is unpublished. The district court's order denying petitioners' motion for contempt (*id.* 2a) is published at 213 F.R.D. 592, 2003 U.S. Dist. LEXIS 5688. This Court has jurisdiction under 28 U.S.C. 1254.

RELEVANT STATUTORY PROVISION

28 U.S.C. 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT OF THE CASE

1. This case arises from the continuing efforts of African-American citizens of Alabama to force their state government to comply with its obligations under the Equal Protection Clause of the U.S. Constitution as well as Title VII of the Civil Rights Act of 1964. The state's history of employment discrimination against African Americans and its ongoing refusal to comply with court orders issued to remedy that discrimination are well documented. In 1970, in *United States* v. *Frazer*, 317 F. Supp. 1079, 1990 (1970) (*Frazer I*),[1]

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[1] *United States* v. *Frazer* (Civil Action No. 68-T-2709-N) is now technically styled *United States* v. *Flowers* in light of the substitution of a new head of the State Personnel Department. The district court has continued to refer to that case as the *Frazer* litigation for purposes of continuity, see Pet. App. 3a, a convention we follow.

the United States District Court for the Middle District of Alabama found that racial discrimination "has so permeated the employment practices of the defendants that [it is] necessary to enter a detailed and specific decree which will not only prohibit discrimination but which will also prescribe procedures designed to prevent discrimination in the future and to correct the effects of past discrimination."

The court accordingly issued just such a decree, mandating that state agencies take specific steps in their policies regarding recruitment, hiring, treatment, assignment, promotion, and dismissal of employees. With the exception of a single provision pertaining to certain named individuals, each of these provisions barred discriminatory treatment of "Negro applicants" and/or "Negro employees" generally. *Frazer I*, 317 F. Supp. at 1090-93. In 1976, recognizing that "systematic discrimination against black citizens of Alabama has been as extensive" as it was before the original 1970 decision, the district court modified the injunction to impose a number of additional requirements; every provision again was expressly designed to protect the rights of "black applicants" and "black employees." *United States* v. *Frazer*, No. CIV.A.2709-N, 1976 WL 729, at *1, *6-*8 (M.D. Ala. Aug. 20, 1976) (*Frazer II*). The district court has retained jurisdiction, and the injunction remains in effect today, as the court has never found that the state has complied with its provisions.

Petitioners represent a class of over a hundred thousand African-American applicants and employees of various departments and agencies of the State of Alabama who brought a series of lawsuits to enforce the *Frazer* injunction, as well as seeking additional relief under the civil rights laws. In 1994, these lawsuits were consolidated as *In Re Employment Discrimination Litigation Against The State of Alabama*, No. CIV.A.94-T-356-N, also known as *Crum, et al.* v. *State of Alabama* (*Crum*).

In 1997, petitioners' claims in *Crum* were furthermore formally consolidated with the *Frazer* case based on the district court's determination that "[t]he claims in the *Crum* litigation have substantial commonality with issues and claims already litigated and decided in *Frazer*." Pet. App. 4a.

2. This petition arises from petitioners' motion to enforce the *Frazer* injunction through a motion for contempt. Petitioners based their motion on Federal Rule of Civil Procedure 71 ("Rule 71"), which provides in relevant part that "[w]hen an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party * * *." FED. R. CIV. P. 71. At the direction of the district court, petitioners filed their motion in the consolidated *Frazer* action.[2]

Petitioners specifically allege that various departments and agencies of Alabama continued to follow the same practices that the district court had already permanently enjoined. For example, petitioners alleged that defendants continue to use "closed registers," which make it impossible for African Americans to apply for historically white job classifications for prolonged periods of time. *Frazer* Doc. 583-6-7. The *Frazer* injunction specifically held this practice unlawful and barred it. *Frazer II*, 1976 WL 729, at *5, *7. In addition, petitioners' contempt motion alleges that defendants have continued "deferring requests for certification" and previewing job registers in the same way that has already been enjoined in *Frazer*. *Frazer* Doc. 583-6-7; see *Frazer II*, 1976 WL 729, at *4 (state agencies circumvented decree by "requesting certificates of eligibility only at times when no blacks were available for certification"). These continuing practices, and numerous others detailed in petitioners' complaint, demonstrate Alabama's disregard of its obligations

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[2] Petitioners initially sought relief in the *Crum* suit, but in April 2001, the district court dismissed the Rule 71 motion in *Crum* without prejudice to their right to refile it as a civil contempt motion in *Frazer*.

under the *Frazer* injunction and supported a finding of contempt.

The district court denied the motion on the ground that petitioners were powerless to seek to enforce the *Frazer* injunction. Pet. App. 19a. The district court disagreed with respondents that nonparties are never entitled to enforce injunctions. But the court agreed with respondents that only those nonparties who are *individually named* in the injunction are entitled to invoke Rule 71. The district court relied primarily on *Northside Realty Associates, Inc.* v. *United States*, 605 F.2d 1348, 1356-58 (CA5 1979), which held that, in cases in which it is a party, the United States may not seek civil contempt damages on behalf of third-party beneficiaries. See Pet. App. 8a-10a.

Petitioners duly filed a timely notice of appeal. The parties then briefed the issue of whether and to what extent Rule 71 permits nonparty beneficiaries to enforce a court order.

After receiving petitioners' brief on the merits, the court of appeals sua sponte requested supplemental briefing, stating that "as it appears that Appellants are not parties to the [*Frazer*] litigation, the parties are ordered to show cause * * * *why this appeal should not be dismissed for lack of standing*." Pet. App. 21a (emphasis added). Petitioners submitted supplemental briefing explaining that, because the district court had denied their motion for contempt, they were "parties" to the denial with standing to appeal under precedents such as *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002). Respondents filed a supplemental brief that forthrightly did not contest the standing of petitioners to appeal. See Resp. C.A. Br. 4 ("defendants assume that if Rule 71 applied and the *Crum* Plaintiffs otherwise had standing to file their contempt motion, they also should be regarded as having standing to appeal").

The court of appeals nonetheless dismissed the appeal for lack of standing. The court ruled that because petitioners "are

not parties to the *U.S. v. Flowers* [*Frazer*] litigation, this appeal is DISMISSED for lack of standing." Pet. App. 1a.[3]

This petition followed.

REASONS FOR GRANTING THE WRIT AND SUMMARILY REVERSING THE COURT OF APPEALS' JUDGMENT

Petitioners request that this Court grant certiorari and summarily reverse the judgment of the court of appeals. Summary reversal is appropriate because the decision below flatly conflicts with this Court's repeated holdings that persons bound by a district court's decision are "parties" to the decision with standing to appeal therefrom. Furthermore, summary reversal will force the court of appeals to take a position on the important issue it circumvented with its bizarre disposition of this case: whether and to what extent Federal Rule of Civil Procedure 71 allows nonparty intended beneficiaries to enforce injunctions. That issue, which has divided the circuits, merits this Court's review, and the Eleventh Circuit's articulation of its view would add measurably to the percolation of that issue in the lower courts.

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[3] As noted in the order, the court of appeals had already dismissed petitioners' appeal to the extent that it constituted an appeal from the district court's judgment in *Crum*, on the grounds that no final judgment existed in that case, since petitioners, although barred from enforcing the *Frazer* injunction, were still free to re-litigate the state's Title VII and Section 1983 liability. On petitioners' motion, the district court then certified the *Crum* case as meriting interlocutory appeal under 28 U.S.C. 1292(b). The court of appeals has not acted on petitioners' request for interlocutory review, which respondents have vigorously opposed.

I. Summary Reversal Is Appropriate Because The Eleventh Circuit's Holding That Nonparties Lack Standing To Appeal Directly Contravenes Supreme Court Precedent.

The court of appeals' order below held: "As Appellants are not parties to the *U.S.* v. [*Frazer*] litigation, this appeal is DISMISSED for lack of standing." Pet. App. 1a. Thus, the court held that appellants (petitioners here) lacked standing to appeal the district court's disposition of their motion, for the *sole and sufficient reason* that they were not parties to the underlying litigation. This ruling runs directly afoul of this Court's repeated holdings that nonparties may appeal adjudications that are binding upon them. See, *e.g.*, *Devlin* v. *Scardelletti*, 536 U.S. 1, 8 (2002); *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). Here, petitioners appealed from the denial of their *own motion*, and that denial clearly binds them as a final disposition of their motion. See 28 U.S.C. 1291 (courts of appeals have jurisdiction over appeals from "final decisions of the district courts"). The court of appeals' egregious error merits summary reversal; indeed, the court of appeals' rationale and disposition are so clearly wrong that even respondents expressly declined to press them below.

1. In a long line of cases, this Court has held that nonparties who are bound by a court's decision may appeal from it. The Court most recently considered this issue in *Devlin*, holding that unnamed class members may appeal the approval of a class action settlement to which they have objected. 536 U.S. at 10. The Court held that the argument that these class members were not "parties," and therefore could not appeal, was contrary to precedent:

> We have never, however, restricted the right to appeal to named parties to the litigation. In *Blossom* v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655, 17 L. Ed. 673 (1864), for instance, we allowed a bidder for property at a foreclosure sale, who was not a named party in the

> foreclosure action, to appeal the refusal of a request he made during that action to compel the sale. In *Hinckley* v. *Gilman, C., & S. R. Co.*, 94 U.S. 467, 24 L. Ed. 166 (1877), we allowed a receiver, who was an officer of the court rather than a named party to the case, to appeal from an order "relating to the settlement of his accounts," reasoning that "for this purpose he occupies the position of a party to the suit." *Id.* at 469. More recently, we have affirmed that "the right of a nonparty to appeal an adjudication of contempt cannot be questioned," *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 101 L. Ed. 2d 69, 108 S. Ct. 2268 (1988), given the binding nature of that adjudication upon the interested nonparty.
>
> Justice Scalia attempts to distinguish these cases by characterizing them as appeals from collateral orders to which the appellants "*were* parties." * * * But it is difficult to see how they were parties in the sense in which Justice Scalia uses the term – those "named as a party to an action," usually "in the caption of the summons or complaint." * * * Because they were not named in the action, the appellants in these cases were parties only in the sense that they were bound by the order from which they were seeking to appeal.

Devlin, 536 U.S. at 7-8. The Court thus concluded that because the unnamed class members in *Devlin* were similarly bound by the order they were challenging, they too had a right to appeal:

> The District Court's approval of the settlement – which binds petitioner as a member of the class – amounted to a "final decision of [petitioner's] right or claim" sufficient to trigger his right to appeal. See *Williams* v. *Morgan*, 111 U.S. 684, 699, 28 L. Ed. 559, 4 S. Ct. 638 (1884) (describing the cases discussed above). And like the appellants in the prior cases, petitioner will only be allowed to appeal that aspect of the District Court's order

> that affects him – the District Court's decision to disregard his objections.

Id. at 9.

As in *Devlin*, here, the district court's denial of petitioners' own motion clearly binds petitioners: it is a "final decision of [their] right" to enforce the underlying *Frazer* injunction. Petitioners are estopped from seeking in the same or any other court to enforce that injunction. Furthermore, just as the *Devlin* petitioners only appealed the district court's decision to disregard their objections, petitioners here appeal only the specific district court order in the *Frazer* litigation that concerns their own motion; they do not claim a right to appeal any other order.

2. Indeed, petitioners' appeal here satisfies even the standard proposed by Justice Scalia in his *Devlin* dissent (*id.* at 16-17): just as in *Blossom*, *Hinckley*, and *United States Catholic Conference*, the district court order on appeal here is a collateral order that specifically addresses the rights of petitioners themselves. Petitioners' claim is most similar to that at issue in *Blossom*, because it is an appeal from the denial of a motion petitioners filed. In *Blossom*, the Court explained that although it was "certainly true" that the appellant there could not "appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid," it was nonetheless "well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings." 68 U.S. at 655-56. Such persons may "appeal from the order denying" the motions they themselves file. *Devlin*, 536 U.S. at 17 (Scalia, J., dissenting). Similarly, here, although petitioners do not claim a right to appeal from other orders in the *Frazer* case issued prior to their motion to enforce the *Frazer* injunction, they do have a right to appeal the district court's disposition of their own motion. See also *United States Catholic Conference*,

487 U.S. at 76 ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned.").

The contrary rule the court of appeals would impose – that nonparties to the underlying litigation may not appeal even orders denying motions they themselves have filed and directly purporting to bind them – has never been even remotely suggested by the other courts of appeals, which instead have faithfully applied the rule of *Devlin* and its predecessors that anyone bound by an order may appeal it. See, *e.g.*, *In re Bridgestone/Firestone Tire Prods. Liab. Litig.*, 333 F.3d 763, 768 (CA7 2003); *Cordoza* v. *Pac. States Steel Corp.*, 320 F.3d 989, 995-96 (CA9 2003); *Karaha Bodas Co.* v. *PERTAMINA*, 313 F.3d 70, 81-82 (CA2 2002). Indeed, the rule established by the Eleventh Circuit is so illogical that not even respondents argued for it below. See Resp. C.A. Br. 4.

That rule would mean that a district court's denial of a motion to intervene in a case would, like the denial of a Rule 71 motion, always be unreviewable, because persons denied intervention are also "not parties to the [underlying] litigation." Pet. App. 1a. But that is not the law; denials of motions to intervene "are, of course, appealable." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (citing *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977)).[4]

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[4] Nor was there any need in this case for petitioners to seek intervention for the purpose of appeal; such intervention is only required where appellants appeal from an order that does not resolve a motion they themselves brought, and that does not directly bind them. See *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (holding that white police officers could not, without first intervening for the purposes of appeal, appeal the settlement in a Title VII suit brought by minority officers against a city police department). *Devlin* specifically held that intervention for the purposes of appeal is *not* required where the appeal is from an order binding on appellants. 536 U.S. at 7-8; *id.* at 9 (distinguishing *Marino* on the basis that the district court order from which the

3. Because the court of appeals' order represents a "demonstrably erroneous application of federal law," summary reversal is appropriate. *Maryland* v. *Dyson*, 527 U.S. 465, 467 n.1 (1999). This Court has frequently summarily reversed unpublished orders. See, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504 (2001); *Nat'l Mines Corp.* v. *Caryl*, 497 U.S. 922 (1990); *Olden* v. *Kentucky*, 488 U.S. 227 (1988); *California* v. *Prysock*, 453 U.S. 355 (1981). Moreover, the underlying issue regarding third-party enforcement of court orders is an important one that has divided the circuits, as discussed *infra*. Reversal on the standing to appeal issue and remand would encourage the Eleventh Circuit to articulate a stance and reasoning on the Rule 71 issue and thus facilitate future review by this Court with the benefit of percolation in the lower courts.

II. The Scope Of Rule 71 Is An Important Issue That Has Divided The Circuits; Remand Would Force The Court Of Appeals To Address The District Court's Erroneous Interpretation And Would Aid This Court's Future Review.

The court of appeals' circumvention of the key issue at the heart of this case – to what extent Rule 71 permits intended beneficiaries to enforce court orders – is especially unfortunate, because that issue is frequently litigated and has sharply divided the circuits. The district court in this case interpreted prior Eleventh Circuit precedent to reach a conclusion no court had previously reached: that only beneficiaries who are individually named in a court order may invoke Rule 71 to enforce it. A remand would force the court of appeals to clarify its position on this important issue, which would benefit this Court if and when it ultimately grants review, as it should, to resolve this circuit split.

Marino appellants appealed "did not finally dispose of any right or claim" of appellants).

Federal Rule of Civil Procedure 71 provides, in relevant part: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party * * *." See *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 n.2 (2000). Thus, nonparty beneficiaries may enforce court orders under Rule 71. See, *e.g.*, *Brennan* v. *Nassau County*, 352 F.3d 60, 64-65 (CA2 2003); *Floyd* v. *Ortiz*, 300 F.3d 1223, 1226-27 (CA10 2002); *Washington Hosp.* v. *White*, 889 F.2d 1294, 1299 (CA3 1989); *South* v. *Rowe*, 759 F.2d 610, 612 n.1 (CA7 1985). However, the courts are sharply divided as to the scope of this enforcement right. Two circuits have held that Rule 71 does not apply at all in the context of consent decrees and have not pronounced on its scope in other contexts; meanwhile, five circuits have rejected this limit on the types of cases in which Rule 71 can be invoked, but have adopted varying rules regarding *who* can invoke it.

1. This circuit split has stemmed from the courts of appeals' efforts to make sense of this Court's statement in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), that "a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it," *id.* at 750. Although *Blue Chip* did not address Rule 71, the Sixth and Eleventh Circuits have concluded, based on a literal reading of the Court's statement, that Rule 71 may not be applied at all in the consent decree context. *Reynolds* v. *Butts*, 312 F.3d 1247, 1249-50 (CA11 2002); *Aiken* v. *City of Memphis*, 37 F.3d 1155, 1167-68 (CA6 1994) (acknowledging circuit split). The other courts of appeals have refused to infer such a significant limit on Rule 71 from a statement not addressing the Rule at all. See, *e.g.*, *Beckett* v. *Air Line Pilots Ass'n*, 995 F.2d 280, 288 (CADC 1993) (refusing to "eviscerate Rule 71 in the context of consent decree enforcements"); *Hook* v. *Ariz. Dep't of Corrections*, 972 F.2d 1012, 1014 (CA9 1992). However, their various approaches to reconciling *Blue Chip*

with Rule 71 have resulted in conflicting interpretations of the Rule that carry implications for cases outside the consent decree context as well, as this case demonstrates.

The Second Circuit has taken the view that *Blue Chip* simply does not apply "to preclude nonparties from intervening to enforce a consent decree where otherwise authorized by the federal rules of civil procedure." *Berger* v. *Heckler*, 771 F.2d 1556, 1565 (CA2 1985). The Ninth and Tenth Circuits have construed *Blue Chip* to reflect, rather than a categorical bar on third-party enforcement, a standing rule: Rule 71 authorizes enforcement of court orders by "intended" but not "incidental" beneficiaries. See *Hook*, 972 F.2d at 1015; *Floyd* v. *Ortiz*, 300 F.3d 1223, 1226-27 (CA10 2002); see also *Moore* v. *Tangipahoa Parish Sch. Bd.*, 625 F.2d 33, 34 (CA5 1980) (applying a similar standing requirement to Rule 71's application outside the consent decree context). Petitioners satisfy this standing requirement easily; as African-American employees of the State of Alabama, they are precisely the people the decree was designed to benefit. In *Securities & Exchange Commission (SEC)* v. *Prudential Securities, Inc.*, 136 F.3d 153 (1998), however, the D.C. Circuit took this "intended beneficiary" test a step further, holding that a nonparty is merely an "incidental beneficiary" of a consent decree unless the language of the decree makes clear that the nonparty was to be given the right to sue to enforce it; a mere intent to *benefit* the third party is not enough. *Id.* at 159. The court left open the question whether the intent to allow third-party suits must be expressed explicitly in the language of the consent decree. Nor did the D.C. Circuit explain whether its intent-based approach was applicable also to the enforcement of court orders other than consent decrees.

2. Without expressly relying on any of these interpretations, the district court in this case adopted an even narrower version of the "intended beneficiary" test, and applied it beyond the context of consent decrees to which *SEC*'s logic had applied. In the district court's view, a court

order is only "in favor of" a nonparty if that nonparty is individually *named* in the order. Pet. App. 11a. Thus, even though the *Frazer* order provided a litany of specific benefits for African-American "employees" and "applicants" for jobs with the Alabama government, other than those specified for the named plaintiffs, the district court held that the order was not "in favor of" those applicants. This interpretation of Rule 71 is flatly wrong. Nothing in the text of Rule 71 refers to "named" or "identified" third parties. The limitation the district court invented out of whole cloth would prevent Rule 71 from ever being invoked to enforce decrees like this one, or those in many other important civil rights cases, intended to provide for systematic changes over an extended period of time. It would have been impossible for the court to specify the intended beneficiaries of its order with any greater specificity than it did; the identities of future African-American job applicants and employees were obviously unknown when the order was issued twenty-four years ago.

Statutory construction should have ended with the plain terms of Rule 71. "We give the Federal Rules of Civil Procedure their plain meaning, and * * * 'when we find the terms unambiguous, judicial inquiry is complete.'" *Pavelic & LeFlore* v. *Marvel Entm't Group*, 493 U.S. 120, 123 (1989) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)); *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). Moreover, the plain-language construction is also consistent with the purposes of Rule 71. By requiring an enjoined party to comply with an existing order at the behest of a nonparty beneficiary, Congress in crafting Rule 71 maximized the enjoined party's incentive to comply with such order by removing any prospect that re-litigation of the enjoined practices might be allowed. "The purpose of Rule 71 is to insure that all court orders are fully enforceable in favor of and against all persons who are properly affected by a judgment, whether or not they are formally parties to the suit." 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 71.02 (3d ed. 2002).

In reaching its interpretation of Rule 71, the district court relied on the circuit precedent of *Northside Realty Associates, Inc.* v. *United States*, 605 F.2d 1348, 1356-58 (CA5 1979), which is not a Rule 71 case. In *Northside*, the court of appeals held that the United States – a *party* to the underlying litigation – could not, as part of a civil contempt motion, seek compensatory damages on behalf of the third parties whom the order was intended to benefit. From this holding, the district court inferred that the third-party beneficiaries were not entitled to seek a contempt order on their *own* behalf. But the combination of the *Northside* rule itself with the converse rule the district court inferred means that *no* civil contempt remedy is possible to enforce orders, such as the *Frazer* injunction, to which the United States is a party. The civil contempt remedy depends on there being a harmed party with standing to seek compensation. When an order is issued on behalf of a group of citizens, as here, and neither the United States nor the citizens themselves have standing to seek a civil contempt remedy to enforce that order (as the district court held), one of the major deterrents against noncompliance is eviscerated. Remand will allow the court of appeals to clarify whether it intended to create this untenable situation.

3. The conflict surrounding the interpretation of Rule 71 is an important one meriting this Court's review. As the above cases demonstrate, this issue arises frequently in the courts of appeals. Furthermore, it arises frequently in cases, like this one, involving litigation of great social significance, in which court orders of long duration are entered and the court retains jurisdiction to supervise compliance.

Moreover, the enormous significance of this case in particular means that this Court should not simply wait for another case to resolve this circuit split, but should summarily reverse, remand, and force the Eleventh Circuit to take a position as to whether it intended either *Northside* or *Reynolds* (which itself dealt only with consent decrees) to extend so far as to bar petitioners' claims. This case concerns

the rights of approximately 30,000 African-American employees of the State of Alabama, as well as 73,000 unsuccessful African-American job applicants. As the state's sorry record of compliance with the *Frazer* injunction demonstrates, racial discrimination in Alabama government employment is still alive and well. It is for this reason that the *Frazer* injunction remains in place, and unless and until the *Frazer* court determines that the injunction is no longer necessary, the African-American citizens whose rights it was entered to protect must be allowed to enforce it.

Petitioners' other option, to re-litigate the liability issues through an entirely new Title VII claim, falls far short of vindicating the important civil rights the *Frazer* injunction was designed to uphold. First, Alabama's record of systematic employment discrimination against African Americans has already been proven, and the court has already carefully fashioned a set of remedial measures for that discrimination. It is duplicative, wasteful, and unreasonable for petitioners to be required to re-litigate those issues; the entire reason courts fashion continuing remedies in complex civil rights cases like this one is to remove this burden from potential future plaintiffs and instead require them only to demonstrate noncompliance with the injunction. Second, civil contempt sanctions can be entered immediately, while remedies in the *Crum* Title VII case will only come after years of litigation. The immediate entry of coercive sanctions is necessary to force the more rapid elimination of race as a factor in state agencies' employment decisions.

The importance of civil contempt proceedings in triggering Alabama's compliance with the antidiscrimination laws is vividly demonstrated by the history of a case related to this one, *Reynolds* v. *Alabama Department of Transportation*, CV-85-T-665-N (M.D. Ala.). *Reynolds* was a class action discrimination lawsuit filed in 1985 against two of the *Frazer* and *Crum* defendants – the Alabama State Personnel Department and Alabama Department of Transportation. In 1992, both defendants entered into a

consent decree whose intent and purpose were to "undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such efforts or otherwise discriminate against the plaintiffs or the class they represent." *Reynolds* Doc. no. 553 at 52. In 1999, both defendants admitted that they had not complied with the decree, and were held in contempt of all twenty-one of the decree's articles. Since then the State has paid over $14 million in fines imposed by the court to coerce its compliance with the decree, and it continues to pay fines even today. Without these fines, continued noncompliance with court orders was a virtual certainty. It was only *after* a finding of contempt that the State made any progress at all toward compliance with the consent decree. The course of the *Reynolds* litigation demonstrates that the coercive power of contempt has a far greater impact on the State of Alabama's compliance with its civil rights obligations than does an initial judicial finding of liability for discrimination.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case and should summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

Filed December 5, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

03-12305-FF

2:68cv2709

UNITED STATES OF AMERICA,
Plaintiff,
EUGENE CRUM, JR., ROBERT L. SMITH, *et al* .,
Interested Parties-Appellants,

versus

THOMAS G. FLOWERS,
ALABAMA STATE EMPLOYEES, *et al*.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Alabama

BEFORE: ANDERSON, BLACK, and CARNES, Circuit Judges.

BY THE COURT:

As Appellants are not parties to the *U.S. v. Flowers* litigation, this appeal is DISMISSED for lack of standing.

United States District Court,
M.D. Alabama,
Northern Division.

In re EMPLOYMENT DISCRIMINATION LITIGATION AGAINST THE STATE OF
ALABAMA, et al.
Eugene Crum, Jr., et al., Plaintiffs,
v.
State of Alabama, et al., Defendants.
United States of America, Plaintiff,
v.
Thomas Flowers, et al., Defendants,
Alabama State Conference of NAACP Branches, Amicus Curiae.

Nos. CIV.A.94-T-356-N, CIV.A.68-T-2709-N.

March 28, 2003.

ORDER

MYRON H. THOMPSON, District Judge.

These causes are before the court on the question of whether the plaintiffs in *Crum* v. *Alabama*, civil action no. 94-T-356-N, who are African-Americans claiming that they have suffered employment discrimination at the hands of the defendants (who are the State of Alabama, its agencies, departments, subdivisions, and individual and official agents) may pursue sanctions for civil contempt. As grounds for contempt, the *Crum* plaintiffs allege that the *Crum* defendants are in violation of orders entered by this court in *United*

States v. Flowers, civil action no. 68-T-2709, in which the United States brought suit to vindicate the state employment rights of Alabama's African-American citizens. *See generally United States v. Frazer*, 317 F. Supp. 1079 (M.D.Ala. 1970) (Johnson, J.). (Because this case was previously styled *United States v. Frazer* and is still usually referred to as *Frazer*, the court will continue to refer to it as *Frazer*.)

By orders entered in both *Crum* and *Frazer* on June 19, 2001, the court held that the *Crum* plaintiffs could not so proceed, and stated that an opinion would follow.[5] Before the opinion could be issued,[6] the *Crum* plaintiffs moved the court to reconsider its decision. The parties in both cases have now extensively briefed the original question of whether the *Crum* plaintiffs may proceed against the *Crum* defendants for contempt based on *Frazer* orders as well as the grounds for reconsidering the court's ruling. For the reasons that follow, the court remains convinced that the *Crum* plaintiffs may not proceed against the *Crum* defendants for civil contempt, and, accordingly, the motion to reconsider will be denied. Moreover, in light of the motion for reconsideration, the court will not issue the opinion it originally indicated would be forthcoming; the instant order suffices to explain the court's reasoning for its initial decision not to permit the contempt proceedings to go forward in *Crum*.

I. BACKGROUND

A recent decision of the Eleventh Circuit Court of Appeals summarizes the background of the *Crum* case. *In re Employment Discrimination Against the State of Alabama*,

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[5] *Crum* Doc. no. 442; *Frazer* Doc. no. 593.

[6] Indeed, in light of the motion for reconsideration, the court will not issue the opinion it originally indicated would be forthcoming. The instant order suffices to explain the court's reasoning for its initial decision not to permit the contempt proceedings to go forward.

198 F.3d 1305, 1308-09 (11th Cir. 1999). The material background facts are as follows: By order entered March 24, 1994, the court consolidated several race-discrimination cases brought by African-American plaintiffs against the State of Alabama and several of its boards, departments, and agencies; the *Crum* plaintiffs also sued the Governor of Alabama and other state officials in their individual and official capacities.[7] Some of the cases were class actions in which the plaintiffs sought relief on behalf of themselves and all other persons similarly situated who were or are employed, or who may be employed in the future by the defendants.

The *Crum* plaintiffs claim, in part, that they suffer discrimination in layoffs, recalls from layoffs, terminations, discipline, hiring, rehiring, evaluations, compensation, transfers, job-duty assignments, recruitment, screening, selection procedures, denial of promotions, demotions, rollbacks, sick leave, subjective decision-making practices, and other terms and conditions of employment that have resulted in disparate impact and treatment of the *Crum* plaintiffs and their putative class. As relief, the *Crum* plaintiffs seek declaratory, injunctive, and compensatory relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. 1981a, 2000e through 2000e-17; the Civil Rights Act of 1866, as amended, 42 U.S.C.A.' 1981; and the fourteenth amendment as enforced through 42 U.S.C.A. 1983.

The claims in the *Crum* litigation have substantial commonality with issues and claims already litigated and decided in *Frazer*, a lawsuit brought by the United States, as stated, to redress systemic and pervasive racially discriminatory employment practices by the State of Alabama and many of its boards, agencies, departments, and officials. *Frazer*, 317 F. Supp. at 1081. In *Frazer*, after a trial, the court found in favor of the United States and entered relief

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[7] *Crum* Doc. no. 1.

permanently enjoining the defendants from "engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose of or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color." *Id.* at 1090; *see also NAACP v. Allen*, 340 F.Supp. 703 (M.D.Ala.1972) (Johnson, J.). Many of the *Crum* defendants are subject to the relief entered in *Frazer*, enjoining them from engaging in many of the practices alleged by the *Crum* plaintiffs.

On September 17, 1997, after briefing and oral argument, the court entered an order consolidating the *Crum* litigation with the *Frazer* litigation "to the extent that there are issues common to both."[8] Because the proper procedure for seeking to enforce injunctive relief is through contempt proceedings, *Florida Ass'n for Retarded Citizens v. Bush*, 246 F.3d 1296, 1298 (11th Cir.2001); *Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir.2000), the court dismissed all *Frazer* claims without prejudice to the rights of appropriate persons or entities to file motions for contempt.[9] The *Crum* plaintiffs moved the court to require the *Crum* defendants to show cause why they should not be held in contempt of court based on the relief entered in *Frazer*.[10] The court entered an order so requiring; the court also invited the United States as the original *Frazer* plaintiff to submit its views on whether the *Crum* plaintiffs could seek contempt sanctions based on *Frazer* orders.[11]

II. DISCUSSION

The *Crum* plaintiffs contend that Federal Rule of Civil Procedure 71 authorizes them to seek contempt for alleged violations of *Frazer* orders, and they claim that they have

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[8] *Crum* Doc. no. 307; *Frazer* Doc. no. 514.

[9] *Crum* Doc. no. 416; *Frazer* Doc. no. 514.

[10] *Crum* Doc. no. 413; *Frazer* Doc. no. 583.

[11] *Crum* Doc. no. 420; *Frazer* Doc. no. 584.

standing to pursue such relief. The *Crum* defendants and the United States argue to the contrary. In part, the *Crum* defendants assert that Rule 71 does not provide an avenue for the *Crum* plaintiffs to seek relief under *Frazer* because persons may never seek to enforce decrees in proceedings to which they are not a party. This is, of course, a threshold question. As the court explains below, the *Crum* defendants are mistaken.

The position urged by the *Crum* defendants is not supported by law apposite to the enforcement of injunctions under Rule 71. The cases upon which the defendants rely, *see, e.g., Tucker v. Troy State University*, 2000 WL 639342 (M.D.Ala.2000); *Salter v. Douglas MacArthur State Technical College*, 929 F.Supp. 1470 (M.D.Ala.1996); *Sims v. Montgomery County Comm'n*, 873 F.Supp. 585 (M.D.Ala.1994), are of limited relevance to resolving the instant question and are not controlling. These cases all held that a non- party did not have standing to seek enforcement of consent decrees to which he or she was not a party. However, none of these cases addresses Rule 71, and all of them draw on law from the Sixth Circuit Court of Appeals, *e.g., Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir.1994); *Jansen v. City of Cincinnati*, 977 F.2d 238 (6th Cir.1992) and Supreme Court precedent, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750, 95 S.Ct. 1917, 1932, 44 L.Ed.2d 539 (1975), that did not apply or interpret Rule 71. Other circuits, including the Eleventh Circuit Court of Appeals, have clearly held or implied that the Supreme Court's holding in Blue Chip Stamps should not be read broadly to prohibit enforcement of court orders by non-parties under Rule 71. *Barfus v. City of Miami*, 936 F.2d 1182, 1187 n. 18 (11th Cir.1991) (stating in dicta that non-parties might proceed under Rule 71 to enforce a consent decree entered in their favor); *see also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 287-89 (D.C.Cir.1993); *Hook v. Arizona*, 972 F.2d 1012, 1014-15 (9th Cir.1992); *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir.1989); *Berger v. Heckler*, 771

F.2d 1556, 1565 (2d Cir.1985); *Gautreaux v. Pierce*, 743 F.2d 526, 533 (7th Cir.1984).

This court agrees with the Second and Ninth Circuits which have held explicitly that the Supreme Court's decision in *Blue Chip Stamps* was not intended to preclude non-parties from seeking to enforce court orders where otherwise authorized by the Federal Rules of Civil Procedure, *Hook*, 972 F.2d at 1014-15; *Berger*, 771 F.2d at 1565, and the court believes that this holding is supported by the Eleventh Circuit's position in *Barfus*.

Thus, the *Crum* defendants are mistaken that Rule 71 may never serve as a basis for a non-party to enforce court orders. The court must therefore determine whether Rule 71 authorizes the *Crum* plaintiffs to seek relief under *Frazer*.

A. Contempt Proceedings

Before the court turns to the task of interpreting the reach of Rule 71, however, a brief detour through the law that governs contempt proceedings is necessary. [12] Civil-contempt sanctions enable a court to enforce compliance with its orders and to compensate a party for losses sustained as a result of non-compliance. *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 443, 106 S.Ct. 3019, 3033, 92 L.Ed.2d 344 (1986); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1547 n. 6 (11th Cir.1996). The ability to issue civil-contempt orders is an inherent power of federal courts. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir.1991). The decision to impose sanctions for a party's contemptuous conduct is discretionary, *e.g., McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir.2000), but if sanctions are imposed, the court must have found that they are warranted based on clear and convincing evidence. *E.g., id.*

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[12] The court notes that the parties have focused on the question of the reach of Rule 71 and have neglected the question of whether the ambit of law that governs civil-contempt proceedings is wide enough to encompass the *Crum* proceeding.

Although civil sanctions are discretionary, the law is not silent as to the circumstances in which it is appropriate for a district court to exercise its discretion to permit a litigant to seek sanctions. The former Fifth Circuit held that the most appropriate litigants to bring contempt proceedings were the parties that litigated the case in which the court entered the order to be enforced. Southern Ry. Co. v. Lanham, 403 F.2d 119, 125 (5th Cir.1968) ("Civil contempt is 'wholly remedial,' serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance.");[13] *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1356 (5th Cir.1979) ("While we need not foreclose altogether the possibility of third party compensatory relief in civil contempt cases, we agree with the District Court that [such relief] ought not to be granted here."). These precedents establish a clear rule that the circumstances in which third parties may enforce court orders through civil-contempt proceedings are limited and that such proceedings are disfavored. *Id.*

The precedent that most clearly developed the contours of this position is *Northside Realty*. There, the United States sought to recover compensatory damages for individuals whose rights were violated by a real-estate corporation that was bound by an injunction prohibiting racially discriminatory housing practices. 605 F.2d at 1350. The United States prosecuted the original case in which an injunction against the real-estate corporation was entered. The government subsequently sought damages for the non-parties against whom the real-estate corporation had allegedly

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[13] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

discriminated. Although the Eleventh Circuit found that the real-estate corporation had violated the district court's injunction, it held that compensatory damages through civil-contempt proceedings were unavailable to the non-party individuals whose rights had been violated. *Id.* at 1358. The appellate court summarized its holding as follows: "[T]he Government may not be awarded compensatory damages for nonparties in a civil contempt action brought to enforce a[n] ... injunction. The problems are substantial. The need is not. Absent express congressional mandate, this Court will not aid the building of such a house of cards." *Id.*

The Eleventh Circuit noted a number of factors that weighed in favor of its determination: (1) the relief sought "cannot be characterized as merely an incidental part of the main cause," *id.* at 1357; (2) permitting the relief "would in effect transform the civil contempt proceeding into a representative class action," *id.*; (3) the relief sought would raise "difficult questions concerning the collateral estoppel or res judicata effect to be given to findings raised by the Court in the contempt proceeding and in any subsequent proceeding or proceedings that might be had to determine the amount of damages to be awarded an individual discriminate," *id.*; and (4) other relief is available that is essentially the same as the relief sought in the contempt proceedings. *Id.* at 1357-58 ("Finally, we point out that there is no compelling need for the relief sought by the Government. Congress has authorized a private Title VIII cause of action whereby private plaintiffs may obtain injunctive relief, compensatory damages, and attorney' fees.... Since Congress has authorized an adequate remedy for individual victims of housing discrimination, we see no reason to imply another one.").

Northside Realty is, of course, not identical to the litigation currently before the court. Unlike the cases at bar, it involved questions of discrimination in housing, not employment discrimination. It involved the government seeking enforcement of an injunction for the benefit of non-parties rather than non-parties seeking to enforce an

injunction won by the United States. It directly addressed the propriety of monetary sanctions rather than other civil sanctions. And, finally, it nowhere directly based its reasoning on Rule 71.

Despite the differences between the situation in *Northside Realty* and that that confronts this court, the concerns that governed the Eleventh Circuit's ruling are materially relevant to these proceedings. Each of the considerations that militated against the pursuit of contempt proceedings in *Northside Realty* is present in the *Crum* litigation. First, Congress has authorized specific and wholly adequate remedial schemes for the species of discrimination alleged by the *Crum* plaintiffs: Title VII, '1981, and' 1983. Indeed, the *Crum* plaintiffs have framed their complaints in terms of these remedial schemes. Second, coming more than 20 years after the entry of the *Frazer* injunctions, the material facts and circumstances of *Crum* litigation cannot in any way fairly be said to be "incidental" to the factual questions litigated in *Frazer*.[14] There is, so to speak, considerable water under the bridge since the relief in *Frazer* was ordered. The *Crum* plaintiffs have already indicated that they will seek to prosecute this action as a class action, and the court has already set schedules and deadlines for considering the issues of class certification. There is no doubt that the course of action proposed by the *Crum* plaintiffs "would ... transform the civil contempt proceeding into a representative class action." 605 F.2d at 1357. Finally, it is plain that the question of the application of the doctrines of collateral estoppel and res judicata will be raised and will be central to the contempt proceedings.

Because each of the factors that precluded awarding contempt sanctions in *Northside Realty* is present (indeed,

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[14] Of course, the age of a case is not a bar to a party who may properly seek to enforce a court's ruling. *Florida Ass'n for Retarded Citizens*, 246 F.3d at 1298.

central) to the proposed contempt proceedings in *Crum*, it is clear that absent some intervening authority, the *Crum* plaintiffs may not enforce the *Frazer* orders through contempt proceedings. In light of this determination, the issue before the court is whether Rule 71 provides the requisite intervening authority.

B. Federal Rule of Civil Procedure 71

Federal Rule of Civil Procedure 71 provides:

> When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

The *Crum* plaintiffs argue that this rule authorizes them to seek enforcement of the relief granted in *Frazer* because the *Frazer* orders were entered "in favor of" African-Americans who are employed by, or interested in being employed by, the *Crum* defendants. The *Crum* defendants and the United States contend that Rule 71's "in favor of" provision may not be read as a broad grant of authority to non-parties to enforce the *Frazer* orders in the *Crum* litigation. Of course, the question before the court involves construing only the provision of Rule 71 that permits a non-party to enforce court orders against a party.[15] As stated, the question is whether Rule 71 provides independent authority for the *Crum* plaintiffs to seek sanctions for contempt against the *Crum* defendants based on the orders entered in *Frazer*. At its heart, this is a matter of the proper interpretation of Rule 71.

The canons of textual interpretation are long-settled. The court must begin with the language of the provision

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[15] The complex questions of due process that are inherent in the enforcement of an order against non-parties have little or no bearing on the court's analysis.

itself. *E.g., Federal Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1239 (11th Cir.2000) ("the starting point for all statutory interpretation is the language of the statute itself"). If the provision speaks with clarity to an issue, then under all but the most extraordinary circumstances judicial inquiry as to the provision's meaning "is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S.Ct. 2589, 2594, 120 L.Ed.2d 379 (1992). However, where a provision is ambiguous, the court must look beyond the text to other sources that are evidence of the meaning of the provision. *E.g., Thomas*, 220 F.3d at 1239 ("If the statutory language is ambiguous, however, courts may examine extrinsic materials, including legislative history, to determine Congressional intent."); *see also Halperin v. Regional Adjustment Bureau, Inc.*, 206 F.3d 1063, 1067 (11th Cir.2000).

Rule 71's "in favor of" provision is ambiguous: it may be read broadly to reach classes of incidental beneficiaries or it may be read more narrowly to reach situations in which an order provides a specific benefit to readily identifiable individuals. The text of the rule itself does not resolve this issue. Thus, the court must seek guidance from extrinsic sources to determine the contours of the right of enforcement provided by Rule 71. Thomas, 220 F.3d at 1239; Halperin, 206 F.3d at 1067.

1. The History of Rule 71

The court looks first to the history of the rule. Clio rarely answers questions about the past directly or unambiguously. Her songs, though beguiling, are notoriously subject to conflicting interpretations. Nonetheless, Rule 71's history, on the whole, indicates that it was intended to enable clearly discernible and direct non-party beneficiaries to enforce specific rights and benefits conferred by court orders. Rule 71 was adopted in 1937 and has been

amended once since then, in 1987.[16] Fed.R.Civ.P. 71, Advisory Committee Notes. The rule is a rewording of former Equity Rule 11, which enabled a non-party to enforce orders made in his "favor ... by the same process as if he were a party" and made a non-party against whom an order was entered to "be liable to the same process for enforcing obedience to such orders as if he were a party." Rules of Practice for the Courts of Equity of the United States, Rule 11, 226 U.S. 649, 652 (1912).[17]

The history of Equity Rule 11 is marked by few reported cases. Those cases, however, reveal that Rule 11 was applied narrowly. For instance, *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 44 F. 653 (C.C.D.Ind.1890), involved a sale on the foreclosure of a railroad mortgage; the court directed its receiver to turn over possession of the railroad to the purchaser's assignee, the *Chicago & Erie Company*. The court reserved the right to resume possession if the assignee failed to pay the purchase price into the court. 44 F. at 654-659. The *Chicago & Erie Company* petitioned the court to exclude another rail company, the Wabash Company, from a stretch of rail. *Id.* at 658. The Wabash Company objected that *Chicago & Erie* could not invoke the assistance of the court. The court held otherwise, finding that *Chicago & Erie* was able to request relief under the identical predecessor to Rule 11. *Id.* at 659. The application of the equity rule, however, was narrow: the party in whose favor the order was

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[16] The Advisory Committee notes indicate that the 1987 amendment was technical and not substantive. *See* Fed. R. Civ. P. 71, Advisory Committee Notes.

[17] The complete text of Rule 11 provides: "Process in Behalf of and Against Persons Not Parties. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process or enforcing obedience to such orders as if he were a party."

entered had been specifically identified and its rights and obligations had been clearly defined and circumscribed.

In *Robert Findlay Manufacturing Co. v. Hygrade Lighting Fixture Corp.*, 288 F. 80 (S.D.N.Y.1923), the court applied Equity Rule 11 to pierce the corporate veil to permit the special master on the case to recover his fees against the owners of the defendant corporation. 288 F. at 80. The court reasoned that, under Equity Rule 11, it had the power to enforce an order requiring the payment of fees against the owners. *Id.* at 81. The court's decision applied the provision of the rule permitting an order to be enforced against a non-party, rather than determining the scope of who might be able to enforce the order itself. *Id.* at 80. Nonetheless, the decision suggests a relatively narrow scope and purpose for the application of the rule: the court determined that the interests of the non-party individuals against whom the court enforced its order were "so closely connected with the [party] defendant" as to be almost "identical." *Id.*

Rule 11, thus, appeared neither to permit broad process against non- parties, nor to permit non-parties broadly to invoke equitable intervention. Courts that construed Rule 11 required a substantial confluence of interests between the non-party and the party, or clear specification in the order of non-parties who might proceed under Rule 11. This court has been able to find no case that construes the scope of Equity Rule 11 as broadly as the *Crum* plaintiffs here propose, to reach any beneficiary of an order; nor has the court, cognizant of the differences in federal litigation between the late nineteenth and early twentieth centuries and today,[18] found equity cases that would suggest that such a broad application was envisioned.

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[18] Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270 (1989); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494

This understanding appears to be shared by the drafters of Rule 71. The advisory committee notes to Rule 71 do not explicitly indicate that the scope of Equity Rule 11 was meant to define the scope of Rule 71, but the notes cite a number of Rule 11 cases as guidance. Fed.R.Civ.P. 71, Advisory Committee Notes; *see also Terrell v. Allison*, 88 U.S. (21 Wall.) 289, 22 L.Ed. 634 (1874); *Farmers' Loan*, 44 F. at 653; *Hygrade Lighting Fixture*, 288 F. at 80, *Thompson v. Smith*, 23 F. Cas. 1093 (C.C.D.Minn.1870) (No. 13,977). Of course, two of these cases, *Farmers' Loan* and *Hygrade Lighting Fixture*, as stated, interpreted Rule 11 or its predecessor Rule 10. Terrell and Thompson, like *Hygrade Lighting Fixture*, are not cases about who may enforce a court order, but against whom such an order may be enforced, and do not address the question of when a non- party may enforce a court order.

Thus, the historical background against which Rule 71 was drafted and the terms in which its authors understood its application strongly suggest that the provision was intended to enable non-parties to pursue relief in court in circumstances where they had been specifically identified as beneficiaries of an order. Of course, that history is not necessarily controlling. The nature of litigation in federal courts has evolved greatly since 1937, particularly as regards what is generally known as public-law litigation.[19] Nonetheless, the history of the rule counsels against extending it as far as the *Crum* plaintiffs here desire.

(1986). There is considerable authority for the proposition that the earlier decisions that were grounded in Rule 11 and private-law conceptions of litigation are of limited value in addressing modern institutional litigation, in which public and private rights are primarily at issue, and in which injury is only partially compensable in monetary terms. Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates and Injunction,* 1980 U. Ill. L.F. 971, 976-77.

[19] For more detailed discussions of the development of public-law litigation and the history of the Federal Rules of Civil Procedure, see the articles cited *supra* note 14.

2. Judicial Interpretations of Rule 71

Bearing the history of Rule 71 in mind, the court turns to the decisions that have construed Rule 71. None of the judicial decisions that have construed the rule resolves the question of how far the scope of the "in favor of" provision should reach.

Most of the decisions that have interpreted Rule 71 have done so in the context of proceedings brought to enforce consent decrees. *E.g., Rafferty v. NYNEX Corp.*, 60 F.3d 844 (D.C.Cir.1995); *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280 (D.C.Cir.1993); *Berger v. Heckler*, 771 F.2d 1556 (2d Cir.1985). Such cases are only of limited use in addressing the question before the court. A crucial task in interpreting consent decrees is ascertaining how the parties intended to delineate who might fall within the range of persons who might invoke it. *E.g., Reynolds*, 202 F.3d at 1316 (applying canons of contract interpretation to interpreting a consent decree). As the Second Circuit Court of Appeals has aptly stated, "consent decrees are a hybrid in the sense that they are at once both contracts and orders; they are construed largely as contracts but are enforced as orders." *Berger*, 771 F.2d at 1567-68. Thus, the parties to a consent decree are free, within the limits that the law provides, to indicate beneficiaries, create zones of interest for the decree's enforcement, and specify how relief may be sought for violations of the decree. Thus the court must reject the argument of the United States that Rule 71 does not extend to permit private, non-party enforcement of orders entered in cases litigated by the United States. The cases on which the government relies to support this contention are cases in which courts were faced with the task of construing consent decrees.[20] *E.g., SEC v. Prudential Securities, Inc.*, 136 F.3d

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[20] In part, the argument of the United States notes that the interests of the government in pursuing civil-rights litigation may well be different from the interests of private individuals in such litigation. Moreover, the United States contends that the public purpose behind such government action

153, 158 (D.C.Cir.1998). However, the Prudential Securities case rejected such a construction of Rule 71. The court stated that "the fact that the government is involved is not in itself fatal to a third party enforcement action." *Id.*

As the *Crum* plaintiffs correctly argue, court orders entered after a trial on the merits are not the product of agreement by the parties, but indicate, rather, that agreement was not reached and a judicial resolution of the conflict was needed. The *Frazer* orders that the private plaintiffs seek to enforce are examples of the latter species of decree, not the former. The *Crum* plaintiffs correctly note that the Prudential Securities court decided that case on contract principles as applied to consent decrees. Cases that turn on the judicial interpretation of consent decrees as contracts are not dispositive of the issue before the court. *Berger*, 771 F.2d at 1567-68.

The cases that have confronted the question of the scope of Rule 71 outside the context of consent-decree enforcement, however, indicate some parameters in how Rule 71 may be construed. It is clear that Rule 71 does not confer standing upon non-parties to pursue relief that they would not have been able to seek had they been parties. *Moore v. Tangipahoa Parish School Bd.*, 625 F.2d 33, 34 (5th Cir.1980) (Rule 71 cannot be adopted by one to enforce an order in an action in which the non-party has no standing to sue); *Lasky v. Quinlan*, 558 F.2d 1133 (2d Cir.1977) (Rule 71 cannot be used by a party to enforce an order in an action in which the party no longer has standing to sue).

The *Crum* plaintiffs, relying on *Tangipahoa*, urge the court to conclude that article III standing is the only relevant

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should not be permitted to be subordinated to the interests of private parties, who may seek to enforce orders entered in such proceedings in ways that may conflict with the overriding public interests pursued by the United States.

consideration in determining the reach of Rule 71. They argue that, if a non-party falls within the zone of interests sufficient to establish article III standing, then Rule 71 provides authority to seek enforcement of an order.[21] By this reasoning, the "in favor of" provision of Rule 71 is simply a proxy for standing. This argument, while superficially appealing, is logically flawed. It is indisputable that a party must have standing in order to institute any judicial proceedings in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573, 112 S.Ct. 2130, 2143, 119 L.Ed.2d 351 (1992)(holding that standing is a requirement for a case or controversy under article III). However, it does not follow that the contours of Rule 71 are coterminous with the limits of standing: simply because a non-party may have standing under the Constitution does not mean that he or she may proceed under Rule 71. Thus, *Tangipahoa* states the obvious and stands for the uncontroversial proposition that standing is a prerequisite to proceeding under Rule 71. *Tangipahoa* cannot be read for the conclusion that article III standing is all that is required to seek to enforce a court order under Rule 71.

Based on the precedents construing Rule 71, this court agrees with the D.C. Circuit that "the precise contours of Rule 71 ... remain unclear." *Beckett*, 995 F.2d 280, 288 (D.C.Cir.1993). There is no clear judicial precedent that establishes, one way or the other, whether Rule 71's requirements are met by the *Crum* plaintiffs.

3. The Reach of Rule 71

An analysis of the history of Rule 71 and the relevant judicial decisions that have construed it in contexts analogous to the present litigation do not resolve the question of how narrowly or broadly the "in favor of" provision of Rule 71

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[21] The court notes that the United States concedes that at least some of the *Crum* plaintiffs appear to meet the requirements of the "zone of interests" prong of standing doctrine. *See* Response of the United States to Private Plaintiffs' Motion to Alter, Amend, or Reconsider Denial of Contempt Proceedings. (*Crum* Doc. no. 486; *Frazer* Doc. no. 601).

may be construed. As stated, the question that the court must answer is whether, in light of Eleventh Circuit precedent that counsels against permitting the *Crum* plaintiffs to go forward against the *Crum* defendants through civil-contempt proceedings, Rule 71 provides independent authority to so proceed. The court, based on the inconclusive history and precedent that define the doctrine of Rule 71, considers that the rule does not so provide.

It is a fundamental axiom of legal decision-making that courts should strive to avoid construing the law in a manner that creates or results in contradiction or conflict. This has most obviously been stressed in the interpretation of statutes. *E.g., Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (courts should strive to interpret statutes in a manner that avoids unnecessary conflict). However, this canon is equally applicable here. The provision of Rule 71 that is at issue is ambiguous. The court, absent clear authority, will not stretch its interpretation of an ambiguous rule of civil procedure so as to override established law of the Eleventh Circuit. Accordingly, the court concludes that the *Crum* plaintiffs' original motion for civil contempt was properly denied and that the *Crum* plaintiffs' motion to reconsider is without merit and will be denied.

For the reasons stated, it is ORDERED that the motion to alter, amend, or reconsider, etc., filed by the *Crum* plaintiffs on July 2, 2001 (*Crum* Doc. no. 465; *Frazer* Doc. no. 596), is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

03-12305-FF

2:68cv2709

UNITED STATES OF AMERICA,
Plaintiff,

EUGENE CRUM, JR., ROBERT L. SMITH, *et al.*,
Interested Parties-Appellants,

versus

THOMAS G. FLOWERS,
ALABAMA STATE EMPLOYEES, *et al.*,
Defendants-Appellees.

2:94cv356

EUGENE CRUM, JR., individually and on behalf of a class of similarly situated individuals, *et al.*,
Plaintiffs,

RODNEY HUNTLEY, GRANT CULLIVER,
Intervenors-Plaintiffs,

versus

STATE OF ALABAMA,
STATE OF ALABAMA DEPARTMENT OF EDUCATION, *et al.*,
Defendants,

FLORENCE/LAUDERDALE COUNTY EMERGENCY MANAGEMENT AGENCY, *et al.*,
Intervenor-Defendants.

On Appeal from the United States District Court for the Middle District of Alabama

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BEFORE: ANDERSON and BLACK, Circuit Judges.

BY THE COURT:

As the Court has dismissed this appeal in part, to the extent that Appellants' notice of appeal evinced an intent to appeal from the *Crum* litigation, and as it appears that Appellants are not parties to the *U.S. v. Flowers* litigation, the parties are ORDERED to show cause within fourteen (14) days of the date of entry of this order why this appeal should not be dismissed for lack of standing. *See Reynolds v. Butts*, 312 F.3d 1247 (11th Cir. 2002).